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No. 610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

ANGELUS MILLING COMPANY,
Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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A.

The Petition for Writ of Certiorari was filed within time.[1]

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on July 24, 1944.

[1] Petitioner is addressing itself to this question, because of the reference thereto in footnote 1, at page 2 of Respondent's Brief, wherein reference is made to **Commissioner v. Estate of Edward T. Bedford**, No. 710 October Term, 1944, and because it is Petitioner's burden to show affirmatively that this Court has jurisdiction. **Gorman v. Washington University**, 316 U. S. 98, 101.

(R. 139.) The case was decided and the opinion of the Court was filed on July 6, 1944. (R. 133.) The petition for a writ of certiorari was filed on October 18, 1944, and was granted on December 4, 1944. (R. 140.)

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, which Act provides, in Par. 8, that *the petition* for a writ of certiorari *must be filed within three months after the entry of such judgment or decree.*

The *judgment* of the Circuit Court of Appeals for the Second Circuit is its "Order of Mandate." If this assertion is true, then the petition herein was timely filed.

The Revenue Act of 1926 was the first revenue act providing for petitions for review, by the Circuit Court of Appeals, of decisions of the Board of Tax Appeals, created in 1924. In connection with the preparation of such petitions, F. W. Dewart, Esq., on behalf of the General Counsel, Bureau of Internal Revenue, addressed inquiries to the clerk of each of the United States Circuit Courts of Appeals, to ascertain exactly when the judgment was entered by each such court. Upon receipt of the replies to such inquiries, the attorneys for the Bureau of Internal Revenue received the following excerpt from the letter of the then Clerk for the Second Circuit:

> "An order for mandate is entered usually one week after a decision is handed down. *This is the only judgment* or decree that is signed, although these orders are subsequently copied into the clerk's minutes. The time for applying

for a certiorari runs from the signing of this order."

After receipt of the "Order for Mandate" herein, counsel for Petitioner inquired of the present clerk of the United States Circuit Court of Appeals for the Second Circuit whether the Order for Mandate is even now the only judgment signed by the Court, and he was orally advised that it is, and that the time within which a petition to this Court may be filed runs from that date.

Upon the granting of the petition in *Commissioner* v. *Estate of Bedford*, No. 710, October Term, 1944, Counsel addressed a letter to the clerk of court, asking whether there had been any change since 1930. To this inquiry, the Clerk replied, as follows:

"February 6, 1945

In reply to yours of the 3rd inst., the order for mandate is the judgment of this Court. The statement made in April, 1930, by the late William Parkin, then clerk of this Court to F. W. Dewart, Esq., then special Attorney to the General Counsel for the Treasury Department, Bureau of Internal Revenue, still stands, with the exception that the time to enter the order for mandate or judgment has been enlarged from seven to fifteen days.

Very truly yours,

Signed: ALEXANDER M. BELL,
Clerk."

If the order for mandate is the judgment of the Court—the only judgment signed by the Court—

then it is the judgment from which the time to petition this Court for a writ of certiorari begins to run.

The Respondent, in its Brief in Opposition in the *Bedford* case, pointed to Rule 30 of the rules of the Circuit Court of Appeals for the Second Circuit and from it drew the conclusion that the opinion of the Court must be its judgment. Otherwise, it was urged, there would be no action of that Court from which to petition, if the mandate were stayed.

The answer is very simple. Section 240(a) of the Judicial Code provides that a petition may be filed either *before* or *after* the entry of judgment by the Circuit Court of Appeals. No action whatsoever is required of the Circuit Court of Appeals as a basis for a petition for a writ of certiorari.

A petition may be filed (1) immediately after the case is docketed in the Circuit Court of Appeals, (2) immediately before argument, (3) after argument but before the opinion is rendered, (4) after the opinion, but before the judgment is entered, or (5) after the judgment is entered—*but* in no event more than three months after the entry of the judgment.

The argument made in the *Bedford* case seems to have ignored the fact that, under Section 240(a) of the Judicial Code, a petition to this Court does not require the entry of a judgment by the Circuit Court of Appeals.

The decision of this Court, in *Department of Banking* v. *Pink*, 317 U. S. 264, is not *contra* to Petitioner's position herein. There, the *judgment was entered* by the Court of Appeals of New York, and it had been the practise to start the running of the

statutory time, *not* from the date of entry of that judgment, but from the subsequent entry of the lower court on the *remittitur*. That practise was held not to comply with the statute.

In the Second Circuit, the time runs from the entry of its judgment, and not from any other date or event. True the judgment is entered two weeks after the opinion is rendered, giving the loser two weeks time within which to petition for rehearing, before the entry of judgment. But, there is nothing in the statute which says, or from which it may be inferred, that any circuit court of appeals must enter judgment the day it renders its opinion.

True, also, in the *Pink* case, this Court said that there was no reason for a different period of review of decisions of the New York Court of Appeals than decisions of other state courts. But—we are not suggesting a different period of review *from the date of entry of judgment*. We are saying only that each circuit court of appeals may determine for itself when it will enter judgment. When it does enter its judgment, then and then only, the three months period begins to run—for an equal length of time as to each circuit court of appeals. Such a view is entirely in keeping with the view of this Court in the *Pink* case.

The decision in *United States* v. *Hark*, 320 U. S. 531 is in point. In that case, the District Court rendered its opinion March 5, 1943, holding that, since the pertinent provisions of the regulation which the appellees were charged to have violated had been revoked prior to the return of the indictment, they could not be held to answer the charge. The last

sentence was: "The Motion to quash is granted."

On March 5 the clerk entered in the docket:—"Sweeney, J. Opinion—Motion to quash is granted." Some days later, the clerk entered on the docket, as of March 5, "Sweeney, J. Indictment quashed."

Upon application of the United States Attorney, Judge Sweeney, on March 31, signed a formal order quashing the indictment, and the clerk struck out the entry of March 5 and entered, as of March 31, "Sweeney, J. Order quashing indictment." On April 30, Judge Sweeney allowed a petition for appeal to this Court.

The Criminal Appeals Act requires that any appeal to this Court be taken "within thirty days after the decision or judgment" has been rendered.

This Court noted that the practise and custom in the District Courts is so diverse that it could not lay down a hard and fast rule as to what constitutes the decision or judgment of the district court. However, as the judge had entered a formal order, knowing he could not extend the time to appeal, this act was given effect and was considered the *judgment* fixing the date from which the time for appeal ran.

Mr. Justice Murphy dissented, and Mr. Justice Douglas and Mr. Justice Rutledge joined in the dissent:

Petitioner's position herein is within the opinions of both the majority and minority in the *Hark* case. The only judgment signed by the Court below is its order for mandate, and it has been the practise, at least since 1930, to consider that the date of the order for mandate fixes the date from which the time for petitioning for a writ of certiorari runs. The

position of Petitioner herein is thus within the opinions of every member of this Court in the *Hark* case.

Petitioner urges that its petition to this Court was timely filed and that this Court has jurisdiction of the case.

In the *Bedford* case, the Government contends that its petition was filed within time, under similar circumstances, and has so noted in footnote 1, page 2, of its Brief herein.

B.

Respondent has misstated the first question of the "Questions Presented."

Respondent says:

> "1. Whether the petitioner's *claim* 'clearly set forth under oath all evidence relied upon in support' of the claim as required by Section 903 of the Revenue Act of 1936, as amended. . . ." (Respondent's Brief, p. 2.)

The statute contains no such requirements. The statute says nothing about the *claim* being accompanied by any evidence. The Act merely requires that all the evidence, whenever submitted in support of the claim, shall be under oath.

While Article 201 of the Regulations (App. A, 8) requires that the claim, Form P. T. 79, be completed, Article 202 definitely suggests that the evidence required by the Form may be submitted at a later date.

Art. 202 of Regulations 96 (App. A, 8-9), which is the Bureau's current interpretation of the mean-

ing of the sentence—"All evidence relied upon in support of such claim shall be clearly set forth under oath"—provides:

> "Art. 202. *Facts and evidence in support of claim.*—Each claim shall set forth in detail and under oath each *ground* upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and *to substantiate* by clear and convincing *evidence all of the facts* necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.
>
> "The provisions of these regulations require that certain specific *facts* shall be stated in support of any claim for refund. The claimant is privileged to *prove those facts in any manner* available to him and to submit such evidence to that end as he may desire." (*Italics* supplied.)

The substance of Article 202 is very similar to the substance of the Regulations respecting claims for refund generally, from 1932 to date, quoted in Appendix E, (Petitioner's Br. p. 60), with an additional reference to the requirement that adequate proof must be submitted in support of the *grounds* (or facts) set forth in the claim for refund of processing tax. However, such a requirement is inherent in connection with all claims for refund.

The practise in the Bureau of Internal Revenue was in keeping with Article 202, and not Article 201, of the Regulations, and was contrary to the position taken by Respondent in the "questions presented." A mere cursory examination of such cases as *18th St. Leader Stores* v. *United States*, 142 F. (2d) 113,

cert. den. Oct. 9, 1944, *Jaubert Bros.* v. *United States*, 50 F. Supp. 366, 141 F. (2d) 206, *Samara* v. *United States*, 129 F. (2d) 594, cert. den. 317 U. S. 686, and many others, will show that *usually* the Commissioner wrote several letters to a claimant for refund, (even as many as five), giving him every opportunity to present evidence lacking on the face of the claim, right up to the time of rejection. If the *statute* required that the evidence accompany the claim, the Commissioner would have been powerless to pursue such a practise—but the statute does not contain such a provision.

The misstated question goes to the very core of Respondent's position—for it is only by assuming such a requirement that Respondent is able to argue that failure to present all of the evidence with the claim is jurisdictional and cannot be waived by the Commissioner. Thus, the question as stated begs the very question involved herein.

Petitioner does not argue, in the face of the many decisions cited in both briefs, that, if the statute contains requirements with which Petitioner has not complied, the Commissioner can waive them.

Petitioner urges that it complied with the requirements of the statute by filing a claim which apprised the Commissioner of the grounds relied upon.

Petitioner also urges that it complied with Article 202 of Regulations 96, except that it did not eventually *submit* all of the evidence supporting its claim, for the reason that the *Commissioner* eventually, through his agent, *obtained* all of the evidence lacking on the face of the claim.

Petitioner failed only to comply with the require-

ments of Form PT 79. But, again, the Commissioner obtained all of the data lacking on the face of that form, prior to his rejecting the claim.

The sole question, then, is, as stated by Petitioner:

> "Whether the Petitioner may maintain its suit for the refund of processing taxes, where the claim for refund contained the nature of the claim, but not the data in support thereof, and where the Commissioner, through an examination of the claim on the merits, by a deputy collector, learned all of the facts and obtained all of the basic data, which, if presented in the claim, would have been an adequate basis for allowing a refund."

C.

Petitioner's Reply to Respondent's Argument.

The replies to Respondent's Argument below are equally applicable to Respondent's Summary of Argument. The points in Respondent's Brief are considered *seriatim*.

1. (Resp. Brief, pp. 12-19.) *Petitioner recognizes that Title VII of the Revenue Act of 1936 provides the exclusive remedy for recovery of amounts paid as tax under the Agricultural Adjustment Act.*

Petitioner also recognizes that the problem involved was complex and that Congress and the Bureau made elaborate plans to deal with it.[2]

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[2] The statute involved has been completely analyzed by this Court. **Anniston Mfg. Co.** v. **Davis**, 301 U. S. 337; **Webre Steib Co., Ltd.** v. **Commissioner**, No. 148, decided February 12, 1945.

To what extent the Commissioner was justified, "in requiring that the necessary information be supplied in a uniform manner and with sufficient completeness to permit it to be promptly handled and verified," (Resp. Br., pp. 18-19), or in waiving such requirements, is not involved herein.

The fact is, that the uniform practise was *not* to require that the evidence accompany the claim, as is to be inferred from Respondent's question k, but to examine the claim, and *then* to give the claimant an opportunity to furnish the evidence lacking on the face of the claim, *prior* to any examination of the claim on the merits. This procedure was followed in the many cases cited in Petitioner's Brief, at page 33, and generally. It was not the practise followed in this case.

The reasons why the uniform practice was not followed in this case are (1) because Petitioner's claim was so inextricably tied up with the claim of Niagara Falls Milling Company that both claims had to be examined on the merits, to make any determination as to either claim, and (2) because, upon examining Petitioner's claim on the merits, the Commissioner obtained all of the data lacking on the face of Petitioner's claim.

It is the failure to follow the uniform practice, which Petitioner asserts as error (a) (R. 66), namely—"in failing to give the consideration to, and the *usual* hearings on, Petitioner's claim."

While attention was called to this departure from the uniform practice, the matter is not pressed, because Petitioner's position is that the Commissioner waived any defect in the form of the claim, upon

his examination of the claim on the merits, and upon his then obtaining all of the data lacking on the face of the claim, which established that Petitioner bore the burden of the tax paid by it.

2. (Resp. Brief, pp. 19-29.) *Petitioner has not failed to comply with the conditions precedent to the maintenance of this action, as urged by Respondent.*

There was not a "failure to comply with the valid requirements of the statute *and* Regulations." There was no failure whatsoever to satisfy the requirements of the statute, and any failure to comply with the requirements of the Regulations was waived by the Commissioner.

Petitioner has not urged that the Government may be sued without its consent, nor has it argued against the necessity of complying with the conditions of the *statute* as a condition precedent to suit, and that compliance therewith is jurisdictional. (Resp. Brief, pp. 19-20.)

These principles, however, refer to compliance with statutory provisions, *not* with Regulations. After stating these principles, Respondent has calmly added to the word "statute"—*and Regulations*, seeking thereby to make strict compliance with the Regulations jurisdictional. There is no basis in the decisions for such a position; in fact, the contrary is true.

Petitioner reiterates—in order to make it very clear—that the Commissioner, prior to the rejection of the claim, had all of the data, including the margin data, called for by the statute, and that the stat-

ute, (as well as the uniform Bureau practice), did not require such data to accompany the Form P. T. 79. It is Petitioner's position that the Regulations, to the extent that they required that certain evidence accompany the claim, could be, and were, waived.

The claim (R. 30-39) contained the name and address of claimant, the amount claimed, a schedule showing the allocation of refund due Niagara *and* Middleport Flour Mills, Inc. (Angelus—the Petitioner) and a statement clearly showing the interrelationship of the two companies, and the total amount of tax paid by the two companies. (R. 30-32.)

True, the allocation contained in the claim for refund (R. 32) does not correspond with the amounts in the petition (R. 51-52) or the amended petition (R. 64-65). The reason is understandable. The claim for refund was filed without the benefit of the books, prior to, whereas the petitions (which do agree as to amounts) were filed after, the Commissioner's examination of the claim for refund on the merits, and after Petitioner had obtained the corrected data from the Deputy Collector. (R. 126-129, App. B, pp. 13-16.)

The claims previously filed on Form 843, (R. 11-19) indicate that the tax was "paid" by Niagara. However, the tax returns filed by the persons liable for the tax were filed by Niagara and/or Middleport—or for both, and the tax was paid out of the funds of each, out of their joint account. The fact that the common officer of both signed the check in the name of Niagara (or Middleport) is therefore of

no significance. The question is—whose tax was paid, and out of whose money was the tax paid? This question will be discussed at length under 4 below.

If the matter were to stop here, and there were nothing further, Petitioner would not be before this Court, in view of the cases cited, at pages 23 and 24 of Respondent's Brief. In fact, Petitioner has given these cases due recognition, at pages 32 to 33 of its Brief.

In these cases, however, the claimant failed or refused to give the Commissioner the evidence which he repeatedly requested; there was no examination of the claim on the merits, so that the Commissioner could, and did, obtain the evidence, and thus there was no waiver of the Regulations. In the instant case, the Commissioner obtained all of the required evidence, when he examined the claims of Niagara *and* Petitioner on the merits. It is this fact that makes this case so fundamentally different from the cases relied upon by Respondent.

Respondent has not denied that all of the data missing on the face of Petitioner's claim was contained in Niagara's claim (R. 20-29), or that both claims were kept together in the Bureau in the custody of the same person, and that these data came from the common books of account of Petitioner and Niagara, which were examined by the Deputy Collector, because such are the facts.

To the argument that all of the claims, considered together, contain the basis data, Respondent has answered—(p. 25):

> "The entire argument is in generalities and much of it is not supported by record. Especially is there no support for the repeated and emphatic assertions that the Commissioner had all of the data necessary to pass upon the petitioner's claim on its merits."

What these generalities are, Respondent does not indicate. Furthermore, the example given is not justified, in the presence of the facts known to Respondent, or which should be known to Respondent, and is unworthy of the Government.

In connection with the hearing on the motion to dismiss for lack of jurisdiction, in lieu of bringing witnesses from Niagara Falls to Washington, at the expense of this small company, counsel obtained affidavits of the accountant present when the Bureau examined Petitioner's claim, and of its President, as he is permitted to do.

As Respondent knows, under Rule IX of the Treasury, its employees are forbidden to testify. A claimant, therefore, must proceed without the benefit of admissions of the truth of its assertions by the Government, in answer to a subpoena.

Jackson swore that he spent several days with several representatives of the Bureau and that they fully examined Petitioner's claim on the merits. (R. 129, App. B, p. 16.)

O'Connor stated under oath that, when the Bureau examined the claim of Niagara, an examination was made of Petitioner's records and that he knows of his own knowledge that Petitioner's claim was examined on the merits. In fact, in 1939, Petitioner received copies of the Government's work papers,

compiled in the examination of Niagara's claim. (R. 126-128, App. B, pp. 13-16.)

When these affidavits were received by the Tax Court, Respondent was given the opportunity to submit affidavits in opposition, but has never done so, because the facts therein stated are true.

On the basis of these affidavits—of the claim of Niagara (R. 20-29) which contains the basic data, including margins, of the offer of the Government to settle with Niagara (R. 126-127, App. B, 14), and of the fact that the processing tax returns and claims for refund of Petitioner and of Niagara, and all of their files have been kept together, Petitioner concludes and asserts that Respondent, on the day Petitioner's claim was rejected, had all of the basic data lacking on the face of the claim.

If these asserted facts are not true, Respondent should certainly have the persons named in the affidavits as the persons who examined the Petitioner's claim on the merits deny them, under oath. If they are true, as they are, it is certainly unfair to this claimant for the Government to make statements respecting these facts—from which an inference to the contrary may be drawn.

Respondent then goes on to say, at page 27 of its Brief, that it knows of no authority which would permit this Petitioner to bring a suit on the claim filed by Niagara and cites innumerable cases to the effect that a claim for refund of the processing tax must be filed by the person who was liable for, and who paid, the tax.

Petitioner has never claimed, and does not now claim, that it may bring suit, or has brought suit, on

the claim filed by Niagara. Petitioner does urge that the data contained in Niagara's claim may be incorporated in its claim by reference—and become evidence in support of Petitioner's claim—by calling its claim "Amendment to Claim"—that the data in Niagara's claim was in a file kept with Petitioner's file in the Bureau—and that the Commissioner had all of the data lacking on the face of Petitioner's claim.

The cases cited at page 27 involved persons who were not first processors and therefore were not liable for the processing tax, or of processors who were first processors and who paid the tax but were reimbursed. While they may or may not have stood the impact of the processing tax, at some time, and even ultimately, Congress did not provide for their relief under Title VII of the Revenue Act of 1936.

Petitioner, on the other hand, was a processor of wheat—and the tax due by it was paid out of its monies—so that it was a person liable for, and who paid, the tax.

The cases cited, therefore, have no application.

From the statement accompanying Exhibit C (R. 33) Respondent concludes, at page 28, that Petitioner disavowed any purpose that Exhibit C be treated as an amendment of Niagara's claim.

The conclusion is not correct. All that Petitioner says in the statement is that—Niagara being bankrupt and having claimed the refund of Petitioner's tax as well as its own, Petitioner does not want its tax refunded to Niagara, but wants the tax it paid refunded to it.

Finally, at page 29, Respondent says that "the

record indicates (R. 126-127, App. B, pp. 13-14) that the Commissioner did not require separate evidence from petitioner until petitioner insisted on separate treatment. Cf. Petitioner's Brief, pp. 25, 48."

This statement is not correct. Petitioner's request for a separate refund was made August 15, 1938. (Ex. C. R. 30-39.) The foregoing admission by Respondent as to proof in the record that *all* of the evidence of Petitioner *and* Niagara was considered by the Commissioner in connection with the examination of Petitioner's claim on the merits covers the years 1938, 1939, 1940 and until May, 1941, when Petitioner's claim was rejected.

Despite this admission, Respondent still suggests that the record does not support Petitioner's assertion that, when he rejected Petitioner's claim for refund, after his examination of Petitioner's claim on the merits, the Commissioner had all of the evidence lacking on the face of the claim.

The Court below was not unwarranted, as asserted by Respondent, in criticizing the Commissioner upon the assumption that he had given the petitioner reason to believe that he would consider its separate claim upon the merits. (R. 136-139.)

The Commissioner's examination of the claims of Niagara and of Petitioner, and of their common records, from 1938 to 1941, did lead Petitioner so to believe, *until the very day* on which Petitioner received the Commissioner's letter of rejection. In fact, until the letter of rejection of May 23, 1941 (R. 40), the Commissioner had contended only that Petitioner was not the taxpayer, a question to be determined on the merits—Point IV, *infra*.

That this was the important question in the Commissioner's files relating to Petitioner's claim for refund is indeed apparent from the fact that, after Petitioner filed its petition with the Processing Tax Board of Review, on August 20, 1941 (R. 7), the Respondent filed a "Motion for Better Statement of Claim" on October 4, 1941 (R. 42), and a "Renewal of Motion for Better Statement of Nature of Claim" on November 26, 1941 (R. 54), raising only the question as to whether Petitioner was the processor and taxpayer. It was not until February 16, 1942, that Respondent moved to dismiss for lack of jurisdiction.

If, on May 22, 1941, only one day before the letter of rejection, Petitioner had filed the data which the Commissioner already had in his files, the defect which is the subject of this proceeding would have been cured.

Surely, this Court will not require such an empty gesture as the basis of a right to a hearing on the merits.

3. (Resp. Brief, pp. 29-38.) *The defects in Petitioner's claim were waived by the Commissioner.*

In its examination of this question—which is in reality the only question involved herein—Respondent has omitted some rather important established facts, or facts deemed admitted upon a motion to dismiss.

From July, 1933, to January, 1936, Petitioner and Niagara were processors of wheat and as such were

required to file processing tax returns and to pay the processing tax. (R. 63) (omitted).

The two corporations, during all of this period, had common officers, a common set of books and a common bank account. (R. 66) (Partly omitted).

From July, 1933, to January, 1935, the two corporations filed *joint* processing tax returns with the Collector for the 28th Collection District of New York. From February, 1935, to December, 1935, Niagara filed returns for both corporations with the same Collector. (R. 63-64) (omitted).

From July, 1933, to December, 1935, the two corporations paid a total processing tax to that Collector of $436,231.73 (R. 20-29). (Omitted.)

In June, 1936, the two corporations filed three joint and several claims for the refund of processing tax, on Form 843, in the total sum of $434,045.27, (R. 11-19), with the same Collector. (Omitted.)

In June, 1937, Niagara filed a claim for the refund of the processing taxes paid by both corporations, on form P. T. 79, which claim was accompanied by all of the data, including margins, called for by the Regulations, with the same Collector. (Omitted.)

In August, 1938, Petitioner filed an "Amendment to Claim" for the refund of processing tax paid by it in the sum of $145,839.12, asking that it receive a refund separate and distinct from any made to Niagara (R. 30-39), with the same Collector. (Omitted in this point.)

All of the foregoing documents were kept together in the office of the Collector for the 28th District and in the Bureau of Internal Revenue, Washington.

In November, 1938, the Deputy Collector examined the claim of Niagara on the merits, and at that time examined all of the books and records of Petitioner. (R. 126-129, App. B, 13-16.)

In 1939, Petitioner received a copy of the Deputy Collector's work sheets—taken from the common books and records of Petitioner and Niagara. (R. 126, App. B, 13.) (Omitted.)

In September, 1940, the Deputy Collector made a further and separate examination of Petitioner's claim for refund on the merits. (R. 126-129, App. B, 13-16.) (Questioned.)

Prior to May 24, 1941, Respondent settled the claim for refund of Niagara. (R. 126-127, App. B, 14). (Omitted.) When Petitioner refused to withdraw its claim, Respondent, then, under date of May 24, 1941, rejected the claim, and for the first time, in the letter of rejection, questioned the sufficiency of Petitioner's claim for refund.

None of these facts can be denied, for they are true. Respondent has referred only to the facts set forth in the affidavits (R. 126-129) relating to the examination of Petitioner's claim on the merits and has left out the other facts, which facts are very pertinent to a determination as to whether the Commissioner, as a matter of law, may be held to have waived the Regulations.

The uncontradicted testimony of O'Connor and Lyons that the Deputy Collector did make a complete examination of Petitioner's claim for refund on the merits is belittled by the suggestion that the required data could not be obtained from the books, or at least from just an examination of the books (Resp. Brief, pp. 33-34). Support therefor is found

in the statement in Niagara's claim (Ex. B, R. 27) to the effect that it had not been able to complete the compilation of its supporting data, as of June 30, 1937, the last day for the filing of claims for refund under Section 903 of the Revenue Act of 1936.

The fact is that the common books and records of Petitioner and Niagara were the only source from which such data could be obtained—that, in 1938, the Deputy Collector obtained the required data from these records, and in 1939, Petitioner obtained a copy of the Collector's work sheets taken from these books and records. (R. 125-129, App. B, 13-16.)

The Tax Court held (1) that the claims did not set forth sufficient evidentiary basis for determining the probable merits of the claim, and therefore, *upon the authority of the cases cited*, the claims were insufficient to give the Court jurisdiction in the proceedings, and (2) that it was unable to hold that the defects in the claim had been (expressly) waived by the Commissioner, so that the proceedings must be dismissed for lack of jurisdiction. The Circuit Court of Appeals reluctantly upheld the Tax Court, on its concept of this Court's decision in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62.

Petitioner has presented no argument with respect to its first conclusion of law of the Tax Court. Petitioner's case is predicated upon the error in the Tax Court's second conclusion of law, resulting from its restricted interpretation of the law respecting waivers.

The second conclusion of law of the Tax Court is based upon holding in effect that the Commissioner

did not expressly waive the defects in the claim. While the Tax Court does not use the word "express," it is obvious, from the following analysis, that that word must be considered part of its subsidiary findings.

A. After examining the affidavits of Lyons and O'Connor, and the letter from the Deputy Collector to Petitioner's President, the Tax Court says: "It has not shown, however, that the Commissioner waived any defects in its claim" (R. 96). That must necessarily mean an expressed waiver.

B. After examining the various allegations contained in the affidavits, the Tax Court concludes: "The affidavits are not convincing that the Commissioner waived any defects in the claim of this Petitioner" (R. 96). Again that refers to an expressed waiver.

C. Again the Tax Court says (R. 97): "The letter of the Commissioner rejecting the claim of the Petitioner indicates on its face that the Commissioner did not waive any defects in the claim." Very obviously this means that, considering the contents of the letter, the Commissioner could not have *expressly* waived the defects in the claim.

The Tax Court's ultimate conclusion of law that there was no waiver of the defects in Petitioner's claim by the Commissioner is contrary to the decisions cited at pages 35 to 41 of its Brief. Such a decision is not final, but is subject to review, if there is to be any review by the appellate courts.

The facts alleged in the Amended Petition must be taken as true for the purpose of a motion to dismiss for lack of jurisdiction. *Ickes* v. *Development*

Corp., 295 U. S. 639, 646; *United States* v. *Revere Copper & Brass, Inc.*, (CCA 2nd), 100 F. (2d) 392. The facts set forth in the affidavits should be accepted as true, in the absence of any proof to the contrary, and Respondent offered no such proof, though permitted to do so by the Judge of the Tax Court. Any facts found by the Tax Court contrary to the only evidence before the Court is an error in law. *Dobson* v. *Commissioner*, 320 U. S. 489, 501; *Planters Operating Co.* v. *Commissioner*, 55 F. (2d) 583, 585, and cases cited therein.

Respondent urges that the statements in the affidavits of O'Connor and Lyons, that there was an examination of the claim on the merits, are inconsistent with error (a) of the pleadings. The Tax Court also misunderstood the purpose of this allegation of error. As pointed out above, Petitioner, in that statement, was complaining only that it had never been requested to furnish any additional evidence in accordance with the usual practice of the Bureau—that it was not accorded the treatment uniformly accorded others.

The Tax Court also concluded that Petitioner had failed to allege that the Commissioner had waived defects in the claim and had investigated the claim on the merits. (R. 97.) While these assertions are not set forth in so many words, they are inherent in, and amply covered by, the assertion that—

> "(C) The Commissioner erred in holding that Petitioner failed *to establish* that it bore the burden of the tax, refund of which is claimed."

The evidence did not accompany the claim. Yet the Commissioner erred in failing to hold that Petitioner had *established* that it bore the burden of the tax. How?

In support of this allegation of error, when the Motions to Dismiss for Lack of Jurisdiction were argued, Petitioner filed the joint tax returns and two affidavits, and made clear that the evidence not submitted by Petitioner was obtained in connection with the Commissioner's examination of the claims of Petitioner and Niagara on the merits. A waiver of the Regulations necessarily had to follow. Otherwise, the error alleged is meaningless.

Respondent then urges, P. 35, "Moreover, no waiver case goes to the extent of holding that a mere discovery of the facts by the Commissioner will constitute a waiver."

Petitioner has not urged this. Petitioner does urge that, if the Commissioner, in connection with his examination of a claim on the merits, obtains all of the evidence lacking on the face of the claim, which he requires by regulation to be submitted, and says nothing about the insufficiency of the claim until the time to amend has expired, he is deemed to have waived the requirement of the regulation. This position is unqualifiedly supported by the decision of the Court of Claims in *Memphis Cotton Oil Co.* v. *United States*, 59 F. (2d) 276, (affirmed on other grounds 288 U. S. 62), and all of the cases cited at page 37 of Petitioner's Brief.

In *Bethlehem Baking Co.* v. *United States*, 129 F. (2d) 490; *Bricker Baking Co.* v. *Rothensies*, 46 F. Supp. 742; *Reynolds* v. *McMurray*, 77 F. (2d) 740;

and *Howbert* v. *Penrose*, 38 F. (2d) 577, and other cases, the Commissioner had not taken definite affirmative action indicating that he had been able to determine an overpayment, as asserted by Respondent, at p. 35, and the facts were held nevertheless to support a waiver in law.

Even if an affirmative finding by the Commissioner were present in each case wherein the Commissioner was held to have waived the defect, it is to be noted that in no case was that fact, in and of itself, considered to be of any importance, or a determining factor, in the cases cited by Petitioner.

Furthermore, should the presence or absence of a finding of overpayment by the Commissioner be determinative of the question involved? If the Commissioner, on the facts present in this case, be deemed to have waived a defect in the claim, should Petitioner be denied a trial on the merits, because the Commissioner will not concede that Petitioner is entitled, on the merits, to a refund? To state the question is to answer it.

It is not necessary that the Commissioner, after his examination of the merits of a claim, make a determination of the merits and notify the claimant thereof, in order that he be held to have waived a defect in the claim, and no Court has placed any such limitation on its decision.

Respondent then argues that the words—"All evidence relied upon in support of such claim shall be clearly set forth under oath"—are not the same as the excerpt from Treasury Regulations from 1916 to 1932, (App. E, Pet. Brief 60) and cites cases (p. 36) alleging that they support a distinction between

the one difference—"all the facts"—as distinguished from "all the evidence."

That this expression in the statute was lifted from the Regulations and the words adapted to fit the needs of the statute cannot be denied. In no other tax statute do these words appear, and they appear only in the Regulations mentioned.

After 1932, the language of the Regulations was changed. (App. E, Pet. Brief 62.)

The Commissioner's own interpretation of the meaning of these words in the Revenue Act of 1936 is substantially the same as his interpretation of the requirements of all claims for refund, whether for income taxes, or excises requiring proof of the burden of the tax. (Cf. Article 202, Regs. 96, App. A, 8 and App. E, Pet. Br. 60.)

In all of the cases cited by Respondent, at page 36, the Petitioner failed or refused to furnish any evidence in support of the claim for refund, (in *18th St. Leader Stores* v. *United States*, 142 F. (2d) 113, cert. den. October 9, 1944, even after five requests); and there was no consideration of the claim on the merits.

In the instant case, Petitioner's books and records were before the Commissioner and he obtained all of the evidence lacking on the face of the claim and considered the claim on the merits.

The difference in the facts readily show why the cases cited have no application and account for the subject case being before this Court.

In those cases, the facts to support a waiver of defects in the form of the claim are lacking; in the subject case they are present.

Finally, the statement of Respondent, at pages 36-37 of its Brief, and the statements and cases which follow show the confusion resulting from misstating question 1.

In referring to *Tucker* v. *Alexander*, 275 U. S. 228, Respondent says:

> "That case was fully explained in *United States* v. *Garbutt Oil Co., supra*, p. 523, and holds simply that a Government official (counsel for the Government in that case) may waive the proper 'form and contents' of a claim for refund, prior to the expiration of the period of limitations, when the only effect of an insistence upon a proper statement would have been 'the resort of filing a new claim and pursuing it through the Bureau and the courts.' (302 U. S. 534.) Here, on the other hand, the Commissioner's alleged waiver would have been an attempted abandonment of an absolute defense to petitioner's claim."

Of course, this conclusion is present in every case in which it has been held that the Commissioner waived requirements of his regulations.

There follow the conclusions (1) that compliance with the statute *and the Regulations* is required as a condition precedent to suit against the Government, and (2) that conditions precedent to suit, prescribed by statute, cannot be waived by the Commissioner.

Clearly, the two conclusions are not dealing with the same subject—nor with the question involved herein.

After combining the statute *and the Regulations*,

Respondent applies the rule which has reference to compliance with statutory provisions only.

Petitioner has not urged that it need not comply with statutory conditions precedent to a suit against the Government, nor that the Commissioner may waive such conditions.

Petitioner does urge that the Commissioner may waive, and can be held to have waived, conditions to suit prescribed by his Regulations, and that he did waive the defects in the claim for refund of Petitioner.

4. (Resp. Brief, pp. 38-39.) *Petitioner is the Taxpayer.*

Respondent continues to urge that Petitioner is not the taxpayer and that for this additional reason the Tax Court was without jurisdiction.

Petitioner recognizes that the Tax Court is without jurisdiction to entretain a suit based upon a claim for refund filed by a person who was not liable for, and who did not pay, the tax.

However, Petitioner was liable for the processing tax on wheat and paid the tax which is the subject of this case. If there is any question in respect thereof, it must be tried on the merits.

Paragraph 2 of the Amended Petition (R. 63) alleges that *Petitioner was a processor of wheat,* during the period July 9, 1933, to January 6, 1936. This allegation is denied in paragraph 2 of the Answer (R. 82), so that the allegation is at issue.

Under Section 9 of the Agricultural Adjustment Act of May 12, 1933, as amended, when the processing tax on wheat became effective, on July 9, 1933, a

processor of wheat became liable for the processing tax on wheat. *As such processor, Petitioner was liable for such tax.*

Paragraph 4 of the Amended Petition alleges that, for the period July 9, 1933, to January 31, 1935, *joint returns on account of the processing of wheat by Petitioner* and Niagara Falls Milling Company *were filed* with the Collector of Internal Revenue for the 28th District of New York, and tax in the sum of $324,016.25, was paid on account of such processing. While this allegation is supported by the actual returns (R. 113) and the statement of evidence (R. 110), the allegation is denied in paragraph 4 of the Answer, so that it is at issue.

Paragraph 5 of the Amended Petition alleges that, for the period February 1, 1935, to November 30, 1935, *returns were filed* in the name of Niagara Falls Milling Company, *on account of the processing of wheat by Petitioner* and Niagara, with the same Collector, and tax in the sum of $110,929.02, was paid on account of such processing. This allegation is denied in paragraph 5 of the Answer and is at issue.

Paragraph 6 of the Amended Petition alleges that, of the aforesaid sums, mentioned in paragraphs 4 and 5, processing tax on wheat in the total sum of *$186,751.99, on account of the processing of 709,906 bushels of wheat by Petitioner, was paid out of monies belonging to Petitioner. This fact, if proved, makes Petitioner the taxpayer.* This allegation is denied in paragraph 6 of the Answer and is at issue.

Petitioner did not allege that it was the taxpayer, a mere conclusion, but alleged the facts showing it was liable for, and paid, the processing tax.

In a trial on the merits, Petitioner will prove that Petitioner and Niagara had a common set of officers, kept a common set of books, and had a common bank account, out of which the wheat purchased by each was paid, and out of which the processing tax due by each was paid.

As Petitioner was a processor of wheat and as such liable for the processing tax, as Petitioner filed returns showing liability for such tax, and as such tax was paid out of its bank account, Petitioner is at a loss to understand how Respondent can still assert that it was not the taxpayer, and that, on that account, the Tax Court was without jurisdiction to hear its appeal on the merits.

The allegations of the Amended Petition are clear and unmistakable, and are at issue. In a trial upon the merits, Petitioner will prove beyond any doubt that it was the taxpayer, and as such, had a right to file a claim, and is entitled to a refund upon proof that it bore, in fact, the burden of the tax.

Regardless, for the purposes of the motion to dismiss, the allegations mentioned are deemed to be true. *Ickes* v. *Development Corp.*, supra; *United States* v. *Revere Copper and Brass, Inc.*, supra.

CONCLUSION

The decisions below are in error and should be reversed, and a review of the merits of the claim for refund by the Tax Court should be ordered.

Respectfully submitted,

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March, 1945.